STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
Whitbeck, P.J., Owens and Schuette, J.J.

SHERRY COMBEN, ANTRIM COUNTY TREASURER,

Plaintiff-Appellee,

-v-

STATE OF MICHIGAN, JAY B, RISING, in his capacity as STATE TREASURER OF MICHIGAN, THE MICHIGAN DEPARTMENT OF TREASURY,

Defendants-Appellants,

PURE RESOURCES, L.P., A Texas limited partnership, DOMINION RESERVES, INC., a Virginia Corporation, WOLVERINE GAS & OIL COMPANY, INC, a Michigan Corporation, WARD HEIRS BEING: EUGENIE R. ANDERSON, STEPHEN WARD DEVINE, ELIZABETH PALMER - DEVINE WISEMAN, MICHAEL EDMUND DEVINE, SUZANNE LEE DEVINE, WILLIAM W. DUNN, DAVID W. FAY, EDWIN R. FAY, PETER W. FAY, ROBERT A. FAY, ROSAMOND S. FISHER, FREDERICK T. GOLDING, successor trustee under the Virginia W. Golding Trust Agreement dated August 30, 1989, NANCY HAMILTON, LISA MARRIOTT JONES, DAPHNE FAY LANDRY, GEORGE S. LEISURE, JR., PETER R. LEISURE, FLORA NINELLES, aka Flora Fay Ninelles, MARJORIE S. RICHARDSON, JAMES W. RILEY, JR., WILLIAM A. RILEY, BARBARA F. ROSENBERG, ELIZABETH R.P. SHAW, ANN WARD SPAETH,

Michigan Supreme Court No. 127212

Court of Appeals No. 248963

Antrim County Circuit Court No. 02-7860- PS

BRIEF ON APPEAL

APPELLEE PLAINTIFF

ORAL ARGUMENT REQUESTED

FREDERICK S. STRONG III, ROBERT A.W. STRONG, Revocable Trust u/a/d 4/17/02 , EUGENIE S. KAUFFMAN, THEIR HEIRS AND ASSIGNS,

Defendants-Appellees.

_____/

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Dated: January 24, 2006

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QUESTIONS PRESENTED FOR REVIEW

I. **Do the State Defendants have standing to prosecute this appeal?**

II. **Are severed oil and gas estates subject to taxation or foreclosure under the General Property Tax Act?**

III. **Does the "in lieu of all other taxes" language in Section 15 of the Michigan Severance Tax Act exempt severed oil and gas estates and such other interests in oil and gas set forth in said Section from taxation under the GPTA and therefore, such interest are not subject to forfeiture and foreclosure under 1999 PA 123?**

IV. **If severed oil and gas interests are subject to foreclosure, does notice by publication of such interest meet constitutional due process requirements?**

Are the provisions of 1999 PA 123, as applied, unconstitutional as a denial of due process as statutorily defined records to be searched will not identify all persons with an interest in the underlying oil and gas?

V. **Are Lessees of mineral rights who have leased the right from the surface estate owner entitled to notice in foreclosure proceedings under the GPTA?**

VI. **Are all persons having an interest in property entitled to notice in an in rem proceeding?**

COUNTER STATEMENT OF PROCEEDINGS AND FACTS

This appeal concerns whether forfeiture and foreclosure under the General Property Tax Act (GPTA)[1] acts to foreclose severed oil and gas mineral estates. Appellees contend, and both the trial court[2] and the Court of Appeals[3], agreed that such interests were not subject to foreclosure under 1999 Act 123 (Act 123).[4]

Appellants claim that "[a]pproximately 45,000 acres[5] of the State's oil and gas holdings" have been amassed since 1932[6] from tax foreclosures in which the oil and gas interests were severed from the surface owner.[7] This is but a prelude to Appellants' many attempts throughout its brief to improperly introduce an ex parte expansion of the record and facts in this matter. There is absolutely no evidence in the trial record below in this matter that such a claim is true. The 45,000 acres, which is now claimed by Appellants, is a far cry from the 2.1 million acres previously alluded to by the Appellant and more recently by the Amici Michigan United Conservation Club (MUCC) to be at risk.

MUCC takes its lead from the State in attempting to inject gloom and doom, the sky is falling "facts" concerning dire consequences to the revenue of the Natural Resources Trust Fund (NRTF) if the Court of Appeals decision is affirmed. The so-called "facts" are not part of the trial record below or are attempts to bootstrap "factual" assertions being made by Appellants in

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[1] 1893 PA 206, MCL 211.1, *et seq*
[2] Appellants' Appendix 13a, pages 19a-26a (Trial Court Decision)
[3] Appellants' Appendix 44a *Antrim County Treasurer v. Dep't of Treasury,* 263 Mich App 474, 481-483; 688 NW2d 840 (2004)
[4] 1999 PA 123
[5] In the 73 years since 1932, the State, on average, has only foreclosed upon 616 acres a year
[6] Appellants' Brief, page 6
[7] Appellants' Brief, page 1

their brief so as to mistakenly portray them to this Court as well settled facts.

The Appellants have additionally inserted in their brief and appendix, ex parte "facts" apparently arising from the trial court decision in *Pure Resources LP v. State of Michigan,* which Appellees Comben, Dominion and Wolverine are not parties to, and clearly are not part of the record below in this matter.[8]

A party may not enlarge the record on appeal ex parte by including documents purporting to be factual in nature, nor facts that are not part of the lower court record.[9] This Court's review is limited to the record developed by the trial court and this Court should not consider references to facts beyond the record below.[10] Appellee-County respectfully requests this Court to ignore or strike any "fact" that is not supported by the record below in this matter.

It was readily apparent to Appellee-Comben that there were serious questions concerning whether severed oil and gas interests were subject to foreclosure and whether the notice provisions of Act 123 met Due Process requirements. In light of these concerns, Appellee-Comben sought declaratory judgment relief.

The Antrim County Treasurer filed a nine-count Complaint for Declaratory Judgment.[11] As set forth in the Complaint for Declaratory Judgment, the Circuit Court had stayed the order of foreclosure of the 134 foreclosed parcels,[12] of which 109 were within Lakes of the North.[13] The

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[8] e.g. Appellants' Appendix 59a, Decision and Order in *Pure Resources LP v. State of Michigan,* Antrim County Circuit Court No. #03-79033-CZ Appellant's Appendix 62a, Decision and Order Granting in Part and Denying in Part Second Motion for Partial Summary Disposition in *Pure Resources LP v. State of Michigan, Id*

[9] *People v Taylor,* 383 Mich 338, 362; 175 NW2d 715 (1970)

[10] *Trail Clinic, P.C. v. Bloch,* 114 Mich App 700, 708- 709; 319 NW2d 638 (1982); lv. den., 417 Mich 959 (1983); *Wiand v. Wiand,* 178 Mich App 137, 143; 443 NW2d 464 (1989) ; MCR 7.210(A)

[11] Complaint, Appendix 1b-22b (Appellee-County has included the entire Complaint in its Appendix as the Appellants only included selected parts of the Complaint

[12] Complaint, Paragraph 50, Appendix 8b

Lakes of the North development is comprised of approximately 7,083 individual subdivision lots, public and private roads, parks, an airport, a golf course and lakes mainly within Antrim County, with the exception of a single quarter-quarter section in Otsego County.[14] [15]

While Lakes of the North is approximately twenty percent of all taxable parcels in the County, it accounts for over 80 % of all parcels foreclosed.[16] [17] The vast majority, if not all of the underlying oil and gas mineral interests, have been severed.[18] A large percent, if not all of the underlying oil and gas mineral interests have been combined for development by a Unitization Agreement[19] known as "Lakes of the North Antrim Field."[20] The Unitized Area comprises about 8,640 acres, in both Otsego County (1040 acres) and Antrim County (7,600 acres).[21] The Unitization Agreement conveys a property contract right (property interest) to share equally in the production of all oil and gas[22] within the Unitized Area.[23]

While the Unitization Agreement appears in the chain of title, it is impossible to determine from the records of the register of deeds whether the Unitization Agreement remained in effect past its original three-year term.[24] Further review of the same record would not show the location of producing oil and gas wells, nor whether the Severance Tax had been paid, as

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[13] Complaint, Paragraphs 51, 56 and 58, Appendix 8b-9b
[14] Complaint, Paragraph 57, Appendix 9b
[15] "Complete title search" from the original patent to the present was obtained upon a single sample parcel, which was foreclosed under the March 1, 2002 order. This title search consisted of four volumes, with over 1,234 pages and more than 400 documents, of which, more than 300 dealt directly with oil and gas interests. See Complaint, Paragraph 55, Appendix 8b
[16] Complaint, Paragraph 59, Appendix 9b
[17] Complaint, Paragraph 60, Appendix 9b
[18] Complaint, Paragraph 61, Appendix 9b
[19] Appendix 29b-37b (Does not include, except Exhibit "A")
[20] Appendix 29b
[21] Complaint, Paragraph 67, Appendix 10b, Unitization Agreement, Appendix 30b
[22] Appendix 32b-33b Art II paragraph 1.7 Appendix 32b
[23] See Appendix 30b-31b paragraph 1.4
[24] Appendix 35b-36b paragraph 6.1

such records are maintained by the MDNR and the Department of Treasury.[25]

Following the trial court decision of April 10, 2003, all remaining counts were dismissed except Count 1, and as to Count 1, judgment was entered in favor of Appellants.[26] The order states, "a foreclosure under 1999 PA 123 does not foreclose any interest, which the State of Michigan may have in property being foreclosed."[27] Despite this favorable judgment, Appellants attempt to maintain that this issue remains "particularly relevant to this appeal."[28] The Appellant is not aggrieved by the order of dismissal, and therefore cannot be an aggrieved party to prosecute this appeal on this ground.[29]

Despite Appellants' and MUCC's claims to the contrary, the gravamen of the Appellee seeking declaratory relief was not concern for the possible liability under MCL 211.78l, but it was whether severed oil and gas minerals were subject to foreclosure, and the scope of notice required.

Appellant, first in oral argument before the Court of Appeals, and now in its brief before this Court [and now joined by MUCC], directly alludes that the trial court's decision was nothing more than a "home town call" to protect Appellee-Comben.[30] While the record below and the Court of Appeals holding do not support such claim, it does point out the weakness of the Appellants' position, as the Appellants are reduced to impugning the trial court's character as opposed to his legal reasoning.

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[25] See generally, MCL 324.61501, *et seq* and MCL 205.301, *et seq*
[26] Appellants' Appendix, 43a
[27] Appellants' Appendix, 43a
[28] Appellants' Brief at page 2
[29] See *Glen Lake-Crystal River Watershed Riparians v. Glen Lake Ass'n*, 264 Mich App 523; 695 NW2d 508, 519 (2004) ("To have standing to appeal means that a person must be 'aggrieved' by a lower body's decision," quoting *Dep't of Consumer and Industry Services v. Shah*, 236 Mich App at 385
[30] Appellants' Brief, page 4, citing to TR 12/16/02, pp 27-28 and page 5, citing to Trial Court Decision, Appellants' Appendix 31a-32a, 34a-35a

The placement in Appellants' brief of the fact that the Circuit Court has certified a class plaintiff, is done so in such a manner to appear to the reader that such action took place in this matter,[31] when in fact no such action occurred in this matter. Any certification would have occurred in *Pure Resources LP v. State of Michigan,* Antrim County Circuit Court No. #03-79033-CZ,[32] and that matter and possible issues arising from that action are not the subject of this appeal.

Appellants are disingenuous in claiming that the Court of Appeals' holding conflicts with the language of the Severance Tax Act. The Appellants' position before the trial court as to oil and gas leasehold estates, was that the "in lieu of all other tax" language in MCL 205.315 did exempt leaseholds from ad valorem real property taxes. The position now being taken by Appellants before this Court is diametrically opposite to their position before the trial court, not to mention positions they have previously taken before this Court and others, and that which is the presently held official position of Appellant-Treasury.[33]

The Court of Appeals affirmed the trial court's holding.[34] Appellants applied for and were granted leave to appeal in this Court in an order dated October 27, 2005. The order directs the parties to address 1) whether State Defendants have standing to prosecute this appeal, and 2) whether a lessee of mineral rights who has leased the rights from the surface estate owner is (a) entitled to notice in foreclosure proceedings under the GPTA.

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[31] Appellants' Brief, page 3

[32] Appellants' Appendix, page 5a, Trial Court Docket Sheet dated March 25, 2003, Stipulation and Order Severing Cross-Claim, Court Clerk to Refile Cross-Claim and Assign Separate Case Number New file # 03-7933-CZ

[33] e.g. Appendix 40b-49b *Cowen v. Department of Treasury,* Michigan Tax Tribunal Docket #125440, fn 8 (1991) fn 8 at Appendix 49b ; Reversed by *Cowen v. Department of Treasury*, 204 Mich App 428; 516 NW2d 511 (1994); appeal denied, 447 Mich 980; 525 NW2d 450 (1994); Revenue Administrative Bulletin (RAB) 1989-22 at Appendix 71b

[34] Appellants' Appendix 44a *Antrim County Treasurer v. Dep't of Treasury*, 263 Mich App 474; 688 NW2d 840 (2004)

SUMMARY OF ARGUMENT

The Appellants neither have standing to appeal the trial court decision of April 13, 2003, nor are Appellants an aggrieved party to the trial court order of May 10, 2003, as the order was in favor of Appellants.

Appellee-Comben notes possible standing for Appellants to prosecute this appeal, as an appeal of right, before the Michigan Court of Appeals,[35] and one of leave before this Court[36] [37] as an injured party as set-forth in *Raines v. Byrd*[38] to defend their own statutes.

The exclusive taxation scheme for severed oil and gas and oil and gas leases is under the Severance Tax Act[39] and not the GPTA. The GPTA by its language, when read in conjunction with the Severance Tax Act, does not in fact, nor in practice, provide for taxation of severed oil and gas estates and/or oil and gas leases. The 1909 Legislature authorized, and in 1913 mandated that upon reconveyance of tax foreclosed property, all minerals, not just oil and gas, must be reserved. Both of these acts presumed that the State had title to minerals. The requirement to reserve minerals after the passage of the Severance Tax Act would only apply to such estates foreclosed in which the surface fee and oil and gas were owned by the surface estate fee owner.

Since severed oil and gas estates and oil and gas leases are covered by the "in lieu of all other taxes" provision of MCL 205.315, they are exempt from taxation under the GPTA, and therefore, exempt from foreclosure there under.

Both the trial court and the Court of Appeals were correct in holding that the Severance

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[35] MCL 600.308; MCR 7.203(A)
[36] MCR 7.301(A)(2)
[37] MCR 7.302(G)(1)
[38] *Raines v. Byrd*, 521 US 811, 831 n2; 117 SCt 2312; 138 Led 2d 849 (1997)
[39] MCL 205.301, *et seq*

Tax Act was in lieu of all other taxes, especially when read in conjunction with the Dormant Mineral Act.

Although not addressed by the Court of Appeals, as it was by the trial court, provisions for identifying persons with an interest in the foreclosed property, when applied to severed mineral owners, is a denial of due process under the State and Federal Constitutions for the reason that if the statutory scheme is followed, it will fail to identify severed oil and mineral estate owners unless this Court finds that the unique makeup of severed oil and gas estate owners is such that notice by publication meets constitutional requirements of due process.

ARGUMENT

I. State Defendants standing to prosecute this appeal.

A. Standard of Review

Whether a party has standing to prosecute or whether a party is "an aggrieved party" for the purpose of appeal is a question of law.[40] Questions of law are reviewed de novo.[41]

B. Requirements for standing to prosecute an appeal

This Court directed the parties to brief whether State Defendants have standing to prosecute this appeal. The State Defendants were the only Appellants in the Court of Appeals and standing was neither raised, nor addressed by the Court of Appeals.

There are two orders, April 13, 2003 and May 10, 2003, which Appellants desire this Court to review.

Appellate courts are required, without request, to determine their own authority.[42] This Court must independently determine the issue of standing.

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[40] *Department of Consumer and Industry Services v. Shah,* 236 Mich App 381; 600 NW2d 406 (1999)

[41] *Devillers v. Auto Club Ins. Ass'n*, 473 Mich 562, 566; 702 NW2d 539 (2005)

"Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly ***at any stage of the proceeding.[43] The United States Supreme Court held in *Mansfield*:

> [T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it.[44]

Courts of this State have recognized the holding of Mansfield,[45] thus, this Court is now required, as was the Court of Appeals, to determine the standing of the State to prosecute this appeal even though the question was not raised below.

The Article III[46] constitutional considerations for standing[47] are set forth in *National Wildlife Federation v. Cleveland Cliffs Iron Company* (*NWF v. CCI*) and *Lee v. Macomb Co Bd Comm'rs.*[48] These cases have been interpreted to impose the requirement of standing at all

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[42] *Mansfield C. & L.M. Ry. Co. v. Swan,* 111 US 379; 4 SCt 510; 28 LEd 462 (1884); *People v. Caballero,* 437 Mich 884; 463 NW2d 891 (1990); *In re Fraser Estate,* 288 Mich 392; 285 NW 1 (1939)

[43] *In re Fraser Estate,* 288 Mich at 394

[44] *Mansfield*, 510 SCt at 510-511

[45] *In re Fraser Estate,* 288 Mich at 394; *People v. Caballero,* 437 Mich 884

[46] U.S. Const., Art. III, § 1

[47] See Appellant's Brief, page 14

[48] *National Wildlife Federation v. Cleveland Cliffs Iron Company*, 471 Mich 608; 684 NW2d 800 (2004) *("NWF v. CCI")*; *Lee v. Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001)

stages of litigation, including appeals.[49]

It has been held that "[b]ecause the State alone is entitled to create a legal code, only the State has the kind of "direct stake" ...in defending the standards embodied in that code,"[50] including defending the constitutionality of its statute(s).[51]

Mich Const. Art 6 § 4 provides that the jurisdiction of this Court for appellate jurisdiction is by rules of the Supreme Court. Co-existing with the issue of constitutional standing to appeal, is whether the party seeking to appeal is an "aggrieved party" as required by MCR 7.203(A). Mich Const. Art 6 § 10 provides that the jurisdiction of the Court of Appeals "shall be provided by law, and the practice and procedure therein prescribed by rules of the Supreme Court." MCL 600.308 set forth the Court of Appeal's jurisdiction as to both appeals as of right and those to be taken by leave.[52]

An aggrieved party, under MCR 7.203(A) is a party aggrieved by a judgment or order when it operates on the party's rights and property, or bears directly on the party's interest.[53] A party is aggrieved by a judgment or order when it operates on his rights and property or bears directly on his interest. To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency.[54]

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[49] e.g. *Arizonans for Official English v. Arizona,* 520 US 43, 68 n 22; 117 SCt 1055; 137 LEd2d 170 (1997); *Diamond v. Charles*, 476 US 54, 68; 106 SCt 1697; 90 LEd2d 48 (1986); *United States Parole Commission v. Geraghty,* 445 US 388, 397; 100 SCt 1202; 63 LEd2d 479 (1980)
[50] *Diamond v. Charles*, 476 US at 65
[51] e.g. *Diamond v. Charles*, 476 US at 62; *ICC v. Oregon-Washington R. & Nav. Co.,* 288 US 14, 25-27; 53 SCt 266, 268-269; 77 L Ed 588 (1933)
[52] MCL 600.308(2)(e)
[53] *Midland Cogeneration Venture Ltd. Partnership v. Public Service Comm.,* 199 Mich App 286, 304; 501 NW2d 573 (1993)
[54] *Grace Petroleum Corp. v. Public Service Comm.,* 178 Mich App 309, 313; 443 NW2d 790 (1989)

C. Analysis

April 10, 2003 Order

In order for the Appellants to have standing, there must be a showing that meets the "irreducible constitutional minimum" set forth in *Lee.*[55] The three elements for standing are:

> First, Appellant must have suffered an "injury in fact" meaning an invasion of a legal protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'
>
> Second, there must be a causal connection between the injury and the conduct complained of –the injury has to be "fairly ... traceable to the challenged action of the defendant, and not the result [of] the independent action of some third party not before the court."
>
> Third, it must be "likely" as opposed to merely "speculative" that the injury will be "redressed by a favorable decision."[56]

Much of the Appellant's argument is nothing more than an attempt to collaterally resolve issues in the pending *Pure Resources LP v. State of Michigan*, Antrim County Circuit Court #03-7933-CZ, [57] which is still pending in the Circuit Court, or improperly seek a bypass appeal of the Court of Appeals.

The Appellants also attempt to bootstrap a standing claim by pointing out that Appellee-Comben was seeking a ruling that the County could foreclose on the State-owned mineral rights.[58] However, Appellants obtained a judgment in their favor on this very claim; that the County could not, under Act 123, foreclose interest in property held by the State.[59] Clearly, after obtaining a favorable judgment, the Appellants cannot use such claim or judgment as grounds for other standing or as an aggrieved party.[60]

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[55] *Lee v. Macomb Co Bd of Comm'rs*, 464 Mich 726
[56] *Lee v. Macomb Co Bd of Comm'rs*, 464 Mich 726
[57] See MCR 7.301(A)(2) and MCR 7.302(C)(1)
[58] Appellants Brief, pages 15 and 19
[59] Appellants' Appendix 42a
[60] *Reddam v. Consumer Mortgage Corp.,* 182 Mich App 754; 452 NW2d 908 (1990)

The Complaint also included additional counts, which were directed at the Appellants;[61] however, all of these matters have been dismissed with prejudice.[62] Upon dismissal of these counts, Appellants were no longer exposed to "injury in fact."[63]

Upon entry of the April 10, 2003 Order and Decision, the Appellants had no interest in the litigation. Since the Appellants were not the FGU in Antrim County, there is no genuine case or controversy that concerns the Appellants. While the trial court has made both adverse and favorable decisions as to the State's claim in its Motion for Partial Summary Disposition,[64] the ultimate outcome is, at best, both 'conjectural' and 'hypothetical'[65] rulings upon the State Appellant's claim. This court should reject Appellants standing based upon its stated position for standing.

May 12, 2003 Order

Following the trial court's decision and order of May 12, 2003,[66] the court entered an order stating that its decision and order dated April 10, 2003 specifically included oil and gas interests.

Appellant is not an aggrieved party to this order. Mr. Smith, counsel for the Appellant argued during oral argument before the trial court that oil leases and rights to develop or operate are not affected by tax foreclosure.

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[61] Two counts, Complaint Counts VI [sic] & VI, dealt with whether Act 123 violated Headlee Amendment IX §§ 6 and 25-31, in particular § 29 of the Michigan Constitution; See Appendix 18b-19b, section 78k(5)(e) of Act 123 violated Article I § 10 of the United States Constitution and Article I § 10 of the Michigan Constitution, Count VII Appendix 20b

[62] Order of Dismissal, Appellants' Appendix 42a-43a

[63] *Lee v. Macomb Co Bd of Comm'rs*, 464 Mich 726

[64] In *Pure Resources LP v. State of Michigan,* Decision and Order, Appellant's Appendix 59a, Decision and Order Granting in Part and Denying in Part Regarding Defendant's Second Motion for Partial Summary Disposition in Appellants' Appendix 62a

[65] *Lee v. Macomb Co Bd of Comm'rs*, 464 Mich 726

[66] Appellant's Appendix 39a-41a

Mr. Smith: **But, it's also in lieu of taxes upon leases or rights to develop or operate any lands of this state for oil and gas so that the leasehold interests that are unitized are not effected by the foreclosure, there may be a change in the legal owner of the mineral rights, and this owner would take subject to, or a new owner, after foreclosure, if the county sold it, it would acquire legal title to those minerals subject to a lease out there, the leaseholder itself is not subject to taxation under the General Property Tax Act and is therefore not subject to foreclosure.[67]

Following this representation by the State, the Court made inquiry of the State as to this issue. The following colloquial between the Court and Mr. Smith clearly crystallized the State's position that oil and gas leases were exempt from both taxation and foreclosure under the GPTA:

Court: One point before you move on there, because I thought it was important and I want to make sure I didn't misunderstand you. Are you saying that the lease owner of the lease, or the owners of the lease, cannot have their position or ownership changed as a result of this foreclosure?

Mr. Smith: That's correct.

Court: Because it's a lease?

Mr. Smith: Because it is a lease. And, under the Severance Tax Act the lease itself is exempt from taxation, but the ownership of oil and gas itself is only exempt once the oil and gas are severed.

Court: Well, if the benefit of the lease, in addition to the severed minerals, is the right to profit from the development of those still in the ground. If those still in the ground get foreclosed, hasn't the lease then been effected (sic).

Mr. Smith: No because the lease is presumably with whoever owns minerals in the ground, there will be a new owner of those minerals who will have the right to the income of the lease.

Court I see what you are saying.

Mr. Smith: So, it's that interest fee title interest, ownership, that gets foreclosed upon but the leasehold interest is not effected. (sic)[68]

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[67] TX 30-31
[68] TX 32-33

With this admission by the State about oil and gas leaseholds, all parties were in agreement that oil and gas leasehold interests were not subject to taxation and foreclosure under the GPTA, as they were exempt under the Severance Tax Act. Perhaps it was due to this admission by the State that the trial court's opinion did not address foreclosure of oil and gas leases.

The State cannot claim to be an aggrieved party when it advances to the trial court that oil and gas leases are exempt from taxation and foreclosure vis-à-vis MCL 205.315, have the trial court adopt the very position being advanced by the State, and then appeal such as a ground for appeal.

The State of Michigan does not have standing as to the May 12, 2003 order, and is not an aggrieved party under MCR 7.203.

Possible Standing –Injured Party

While the Appellants have failed to state any valid grounds for standing, Appellants may have standing to appeal. In *Raines v. Byrd*,[69] Justice Souter, in a concurring opinion joined by Justice Ginsburg, wrote in footnote 2[70] that the injury required for standing for appeal may be found if there is impairment of certain official powers,[71] and that an injury to official authority may support standing for a government itself or its duly authorized agents to support standing,[72] or they may have standing to defend their own statutes.[73]

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[69] *Raines v. Byrd*, 521 US 811; 117 SCt 2312; 138 Led 2d 849 (1997)
[70] *Raines v. Byrd*, 521 US at 831 n2
[71] Citing *McGrain v. Daugherty,* 273 US 135, 174; 47 SCt 319, 328-329; 71 LEd 580 (1927)
[72] Citing *Diamond v. Charles,* 476 US 54, 62; 106 SCt 1697, 1703; 90 Led 2d 48 (1986)
[73] Citing *ICC v. Oregon-Washington R. & Nav. Co.,* 288 US 14, 25-27; 53 SCt 266, 268-269; 77 LEd 588 (1933) (explaining that a federal agency had standing to appeal because an official or an agency could be designated to defend the interests of the Federal Government in federal court)

Based upon Justice Souter's concurring opinion, and that a central issue for Appellant on appeal is the imputation of a state taxing statute, Appellee-Comben notes that Appellants meet the standing requirements for appeal, but only related to severed oil and gas interests and not leasehold interests.

II. Severed oil and gas rights are not subject to taxation or foreclosure under the GPTA.

A. Standard of Review

Issue decided below by summary disposition and issues involving statutory construction are reviewed de novo.[74] Declaratory rulings are also reviewed de novo.[75]

B. Michigan Oil and Gas Law

The Michigan Courts have long held that the unique physical characteristics of oil and natural gas require distinctive legal principles and have created a well-developed set of principles, which are applicable only to oil and gas interests.

Like their subterranean solid mineral counterparts, oil and gas are minerals, however the Courts have, for more than 100 years, recognized that they are vastly different for one very simple reason - oil and gas have no fixed situs and by their very nature, migrate across property lines.[76] It is well-settled law that subsurface oil and gas are a real property interest that can be transferred separate from the ownership of the surface estate[77] and are entitled to the same

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[74] *Bingham Twp v. RLTD R Co*, 463 Mich 634; 624 NW2d 725 (2001); *Kellogg Co. v. Dep't of Treasury*, 204 Mich App 49; 516 NW2d 108 (1994)
[75] *AFSCME v. Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003)
[76] *Ohio Oil Co v. Indiana,* 177 US 190, 203; 20 SCt 576; 44 LEd 729 (1900)
[77] See *Van Slooten v. Larsen*, 410 Mich 21; 299 NW2d 704 (1980), appeal dismissed; 455 US 901; 102 SCt 1242; 71 L Ed 2d 440 (1982); *Southwestern Oil Co v. Wolverine Gas and Oil Co. Inc*, 181 Mich App 589; 450 NW2d 1 (1989); *Eadus v. Hunter*, 268 Mich 233; 256 NW 323 (1934); *Mark v. Bradford*, 315 Mich 50; 23 NW2d 201 (1946); *Jaenicke v. Davidson*, 290 Mich 298; 287 NW 472 (1939); *Attorney General v. Pere Marquette Ry Co*, 263 Mich 431; 248 NW 860 (1933)

constitutional protection as the surface fee.[78] While such interest is a real property right, the only ownership interest in the unproduced oil and gas is the right to reduce the oil and gas to possession, and thus acquire title.[79]

In *Mark v. Bradford*,[80] the court concluded that unaccrued oil and gas royalties (not yet produced) are an interest in real property, and a conveyance of such is a grant of a *profit a prendre*. This Court has held:

> A *profit a prendre* is primarily the power to acquire, by severance or removal from another's land, something previously constituting part of the land, such as minerals. It is distinguishable from a mere license or easement because it includes the right to remove. A *profit a prendre* in the form of a right to carry on mining operations transfers no present interest in the minerals in place. The holder of the profit owns the minerals only after severance. There is no right to use the land except as incident to the mining. Until the right is actually exercised and possession is taken, it is a floating, indefinite, mere incorporeal right. Similarly, under any oil and gas lease, the lessee acquires the right to presently use and occupy that portion of the surface of the land needed to explore the premises for oil and gas. The failure to find oil or gas does not give the lessee the right to rescind the contract or to recover damages.[81] (Citing omitted)

These principles were applied in *Department of Transportation v. Goike*,[82] when the Court held that the transfer of oil and gas rights did not include the subsurface strata, as the surface owner retains the rights to all subsurface strata, including storage rights.

It is interesting to note that taxation of the subsurface strata formation used for storage is specifically provided for in the GPTA.[83] It is even more noteworthy that in 1982, when the Legislature amended Section 8(g) to specifically add for the taxation of subsurface storage interests, it elected not to impose specific taxation upon in place oil and gas. Since 1982, Section

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[78] *City of Kentwood v. Estate of Sommerdyke,* 458 Mich 642, 651 fn 3; 581 NW2d 670 (1998)
[79] *Michigan Consol Gas Co v. Muzeck*, 4 Mich App 502; 145 NW2d 266 (1966), judgment aff'd, 379 Mich 649; 154 NW2d 448 (1967); *Jaenicke v. Davidson*, 290 Mich 298
[80] *Mark v. Bradford*, 315 Mich 50
[81] *Mark v. Bradford*, 315 Mich at 59
[82] *Department of Transportation v. Goike*, 220 Mich App 614; 560 NW2d 365 (1996)
[83] MCL 211.8(g)

8[84] has been amended four times without imposition of any tax under the GPTA upon underlying oil and gas.

It is well settled that ownership of the oil and gas, whether by lease or deed, carries with it the right to use the surface of the premises, without any liability for surface damage caused by operations, so long as such use and the manner of its exercise are reasonably necessary to effectuate the purposes for which the lease was made.[85]

Oil and gas in the ground "is everywhere held to be real property, an interest in land" in the nature of an unaccrued oil and gas royalty, a *profit a prendre.*[86] Thus, it is clear that owners of severed oil and gas minerals or those who share in the profits, have a real property interest, and are entitled to due process notice before a FGU forecloses their interest.

Michigan courts have recognized that no one owner of the surface estate under which gas and oil migrates can exercise the right to extract from the common reservoir without to some extent diminishing the common source as to all other owners of the surface. What the United States Supreme Court pointed out more than 100 years ago remains true today:

> 'Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal, and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property.[87]

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[84] MCL 211.8
[85] *Michigan Oil Co v. Natural Resources Commission,* 406 Mich 1; 276 NW2d 141 (1979)
[86] *Mark v. Bradford,* 315 Mich at 59
[87] *Ohio Oil Co v. Indiana,* at 20 SCt 581

The Michigan Courts, in dealing with these competing interests, have recognized the "rule of capture."[88] To mitigate the harshness of the rule, and to protect property rights in oil and gas, the "fair share" principle emerged,[89] which is achieved by pooling tracts of lands, especially smaller tracts of land. Pooling can be either voluntary or compulsory.[90] Voluntary pooling such as Unitization Agreements, addresses the fair share concerns by allocating the profit from oil or gas produced among parties.[91]

C. Analysis

Since the enactment of the Michigan Severance Tax Act more than 75 years ago, in place severed oil and gas interests have never been subject to ad valorem real property taxation or personal property taxation under the GPTA, in particular §§ 2 and 8.[92] Amici MUCC and Appellants, in this era of declining State budgets, would have this Court reverse this taxation scheme. The Appellants would have this Court become a super legislature and judicially impose ad valorem real property taxation or personal property taxation under §§ 2 and 8 of the GPTA[93] upon in place severed oil and gas interests when the Legislature has refused to do so. By having this court judicially change this well established taxation scheme, Appellants avoid having the legislature address the issue and thus, avoid the accompanying Headlee Amendment issues, giving both the Executive and Legislative Branch the political cover that it was the Courts that imposed the tax upon severed oil and gas interests. Appellee-Comben would submit it is the

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[88] *Wronski v. Sun Oil Co*, 89 Mich App 11; 279 NW2d 564 (1979)
[89] *Wronski v Sun Oil Co,* 89 Mich App 11;
[90] MCL 324.61513(4); *Traverse Oil Co v. Chairman, Natural Resources Com'n*, 153 Mich App 679; 396 NW2d 498 (1986)
[91] *Manufacturers Nat Bank of Detroit v. Director of Dept of Natural Resources,* 420 Mich 128; 362 NW2d 572 (1984);
[92] MCL 211.2 and MCL 211.8
[93] MCL 211.2 and MCL 211.8

Appellant's rationale that is the radical change from the settled practice and understanding that a severed oil and gas interest is not subject to ad valorem taxation under the GPTA.

"It is the function of the court to fairly interpret a statute as it then exists; it is not the function of the court to legislate."[94]

If this Court adopts the Appellants position, it would be a call to all local assessors to spread out over this State, assessing for the first time, the true cash value of severed oil and gas estates in order to tax such interests for ad valorem real property or personal property tax roles.

Amici MUCC ponders how "a question of such importance could go unanswered for more than 70 years after passage of the Severance Tax Act."[95] The answer to this question is rather simple; there has never been an attempt to assess, let alone impose, ad valorem real property tax or personal property tax under the GPTA upon such oil and gas estates. The absence of any reported cases, whether before the Michigan Tax Tribunal or any Appellate Court of this state addressing the taxable value and/or ad valorem real property taxation or personal property taxation of in place oil and gas clearly shows just how much of a radical change this would be.

Appellee-Comben would submit that it was not the trial court nor the Court of Appeals' "overly expansive reading" of the Severance Tax Act, but rather it is MUCC and Appellants' "overly expansive reading" of the GPTA, coupled with a very limited reading of MCL 205.315, that will pry open the door that has been shut for more than 75 years and has kept the tax collectors at bay from imposing ad valorem real property or personal property taxation under the GPTA upon severed oil and gas interests, only to have the same interests taxed under the Michigan Severance Tax Act. It is not a threat to the NRTF that should be of concern, but instead, it is the threat that the State will now be able to impose new taxation under the GPTA,

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[94] *Melia v. Employment Security Comm,* 346 Mich 544, 561-562; 78 NW2d 273 (1956)
[95] Amici MUCC's brief, page 7

which for the last 75 years has been only subjected to taxation under the Severance Tax Act. The possible loss to the NRTF will pale in comparison to the millions of dollars of windfall in ad valorem taxation imposed upon severed oil and gas owners if this Court adopts the position of MUCC and Appellants.

Appellee-Comben maintains that a severed oil and gas fee interest is not subject to taxation under the GPTA, as such separate estate is not included in the "true cash value" assessment of the surface estate.

A clear indication that a severed oil and gas estate is not subject to the GPTA is that the Michigan Assessors' Manual is devoid of any instructional information as to how an assessor is to determine the assessed value of oil and gas underlying the parcel, which is to be included in the parcel's "true cash value." However, the Michigan Assessors' Manual does contain instructions on how to value timber (See Vol. III, Ch 3) and flowage rights (See Vol. III, Ch 12, page 11-12)[96] both of which are specifically mentioned in MCL 211.27. MCL 211.27 makes no direct mention of oil and gas.

The Michigan Constitution mandates uniformity in ad valorem taxation of real property.[97] To this end, the Tax Commission is required by law to issue the Michigan Assessors' Manual or such other approved manuals.[98] An assessor can only use the Michigan Assessors' Manual or other manuals approved by the Michigan State Tax Commission to assist them in making a determination as to "true cash value" of an interest for the purpose of ad valorem taxation.[99] While the Michigan Assessors' Manual does not hold the force of law, it is a guide that must be

[96] Flowage rights are only to be valued at a nominal amount per acre
[97] Mich Const. 1963, Art. 9, § 3
[98] MCL 211.10e
[99] Michigan Administrative Code (AC) R 209.26(3)

used in making an assessment.[100] The Tax Commission's failure to adopt any standards as to valuing severed oil and gas estates leaves assessors to their own devices. Without any instructional information as to how to make such a determination of the "true cash value," there could be no uniformity as required by Art. 9, § 3.

The Appellants argue that the GPTA does not allow for a separate assessment of the surface fee and subsurface severed oil and gas mineral fee. Thus, when not assessed separately, the severed interests, along with the surface estate, are subject to foreclosure for non-payment of real property ad valorem taxes. An interest in land is subject to tax foreclosure only if that interest is subject to taxation.[101]

Appellants maintain that when a property interest is severed into different estates, the entire property is assessed, and all estates are liable for the tax, subject to a right of contribution from other estate holders, citing *Krench v. State*[102] and *Rathbun v. State.*[103] The fallacy of this argument is two-fold. First, the value of a severed oil and gas estate is not and has never been used to determine the "true cash value."[104] It is interesting to note that the value of an oil and gas estate has never been part of the assessment of "true cash value", even when the sub-surface and surface interests are jointly held by the surface owner. Second, the oil and gas in the severed estate, by their very nature, migrate across property lines and therefore have no fixed situs for taxation. In situations where there is difficulty in determining the situs of property for the

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[100] *Danse Corp v. City of Madison Heights*, 466 Mich 175, 181; 644 NW2d 721(2002)
[101] *City of North Muskegon v. Rodgers*, 188 Mich 93; 154 NW 71 (1915); *Hammond v. Auditor General*, 70 Mich App 149; 245 NW2d 544 (1976); C*f Smith v. Auditor General,* 138 Mich 582; 101 NW 807 (1907)
[102] *Krench v. State,* 277 Mich 168; 269 NW 131 (1936)
[103] *Rathbun v. State*, 284 Mich 521; 280 NW 35 (1938)
[104] See Appendix 86b, David Grimm's affidavit (signed original part of the record below)

purpose of taxation, the legislature has addressed it legislatively.[105] The failure to do so with severed oil and gas estates within the GPTA is a clear indication that the estate is not subject to taxation under the GPTA, but only under the Severance Tax Act.

Further support can be found in Revenue Administrative Bulletin 1989-22 (RAB),[106] which states:

> The purpose of this Bulletin is to clarify the provision in the Michigan Severance Tax Act, MCL 205.315, stating in part: "[T]he severance tax herein provided for shall be in lieu of all other taxes, state or local, upon the oil or gas, * * *
>
> It is the Department's position that this provision extends only to the ad valorem property taxes that were in effect at the time the above-referenced section was enacted (1929). If it was the legislature's intent to extend this provision to the sales, use or single business tax, a provision for exclusion would be contained in those individual Acts, all of which were enacted after the exemption provision of the Severance Tax Act. (Emphasis Added)

This RAB clearly sets forth the Appellant -Treasury Department's long held position on the relationship between the Severance Tax Act and ad valorem real property taxation under the GPTA. "Construction placed upon statutory provisions by any particular department of government for a long period of time ... should be given considerable weight."[107]

Appellants point to 1911 PA 51 [now repealed by 1915 PA 119], which provided for separate assessment of severed minerals, including oil and gas. 1911 PA 51 specifically mentioned and provided for the separate assessment of "mineral, coal, *gas*, gypsum, *oil*, mining or other rights to any lands within this, or the ores, *oils*, gravel valuable deposits or mineral contained therein. (Emphasis Added)[108] It is clear that by repealing 1911 PA 51 just four years later, the Legislature understood the folly of attempting a taxation of in ground oil and gas, as it

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[105] e.g. MCL 211.8
[106] See Appendix 71b Revenue Administrative Bulletin 1989-22
[107] *Melia v. Employment Security Comm,* at 565
[108] 1911 PA 51, § 1

is too difficult to determine their taxable value.

The State, after its first failed attempt at ad valorem taxation of oil and gas, did away with all ad valorem taxation upon oil and gas interests with the passage of the Severance Tax Act more than seventy years ago. The Appellants would have this Court invalidate this legislative decision. The Legislature determines all questions of necessity, discretion, or policy in ordering a tax and in apportioning it. The Courts have no concern with wisdom or policy of state taxation.[109]

Appellee-Comben agrees that the GPTA provides "[T]hat all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."[110] However, all property is not subject to the same taxation scheme, nor subject to ad valorem taxation.[111] Both the GPTA and Art 9, § 3 recognize different classifications of property must be handled differently for determining taxation. The trial court properly held that severed oil and gas minerals and oil and gas leasehold interests are not subject to foreclosure under the provisions of Act 123.

The Appellants maintain that this Court has held that oil and gas rights are subject to foreclosure under the GPTA, relying upon *Krench* and *Rathbun.*[112] Appellee-Comben does not dispute that under limited circumstances not present here [i.e. surface and subsurface fee remain solely in a single owner], the underlying oil and gas interest can be subject to foreclosure. This is not because of the holding of *Krench* and *Rathbun*, but because there is but a single fee estate,

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[109] *C. F. Smith Co. v. Fitzgerald*, 270 Mich 659, 670; 259 NW 352 (1935)
[110] MCL 211.1
[111] e.g. Mich Const Art 9, § 3, MCL 205.301, *et seq.* [oil and gas]; MCL 211.7v, [railroad property];MCL 211.6a, MCL 211.6b MCL 211.24, MCL 211.624 [metallic ore and mining]; MCL 320.281 [private forest]; MCL 320.301(5)[commercial forests]; MCL 211.34c(2)(a), MCL 211.34c(2)(f), MCL 211.34c(5), as well as MCL 211.27(1) make specific references to timber
[112] *Krench v. State,* 277 Mich 168; 269 NW 131 (1936); *Rathbun v. State*, 284 Mich 521; 280 NW 35 (1938)

which had been singularly assessed under MCL 211.1(2). However, upon a closer reading of these cases, they are not applicable and are clearly distinguishable from the issue before this Court.

In both *Krench* and *Rathbun,*[113] the original purchasers, in accepting the deeds from the State, acknowledged the State's title *and* its reservation of oil and gas rights.

In *Krench,* this Court was not dealing with the GPTA, but with the Public Domain Commission Act, which at that time required reservation of oil and gas. The Court's decision in *Krench* relied upon generally recognized law of real property.[114]

In *Rathbun,* like in *Krench,* this Court assumed that statutory procedures for foreclosure of tax delinquent property had been properly done so that, "the state held title in fee simple."[115] In *Krench,*[116] and *Rathbun* there is no mention as to whether at the time of foreclosure the surface and subsurface fee were anything but in a single owner.

In both *Krench* and *Rathbun,*[117] this Court was not faced with, nor did it address, problems that could arise if the ownership interest in the surface and subsurface estate had been severed before foreclosure.

Appellants also rely heavily on *Curry v. Lake Superior Iron Co.*[118] However, *Curry* was decided before the enactment of the Severance Tax Act , and the court rejected the defendant's attempt to rely on a Minnesota law [which allowed for separate assessment of severed interest], and held that Michigan law at that time did not allow for separate taxation of the different estate in a parcel, thus, separately owned estates must be taxed together. The whole underpinning in

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[113] *Krench v. State,* 277 Mich 168; *Rathbun v. State*, 284 Mich 521
[114] *Krench*, 277 Mich at 179
[115] *Krench*, 277 Mich at 179
[116] *Krench*, 277 Mich at 179
[117] *Krench v. State,* 277 Mich 168; *Rathbun v. State*, 284 Mich 521
[118] *Curry v. Lake Superior Iron Co.,* 190 Mich 445; 157 NW 19 (1916)

Curry was the Court's reliance upon the "construction put upon the statute by the administrative officers of the state charged with the duty of levying and collecting taxes under the law."

The Court held:

> While the foregoing is of no binding force, it indicates the construction put upon the statute by the administrative officers of the state charged with the duty of levying and collection taxes under the law. Under section 3850, supra, *it would seem that no other method of assessment would be possible.* In this state, therefore, we have this situation: All of the estates in any particular description must be assessed together, and it is unimportant whether the assessment is made to all or to but one of several owning interests or estates therein. (Emphasis Added) [119]

Appellee-Comben would maintain that *Curry* is not controlling, as the *Curry* Court did not address the Michigan Severance Tax, nor the various sections of the GPTA, which allow separate assessments of separate estates in a single parcel,[120] or for the payment or partial payment of taxes based upon a party's separate estate.[121]

MCL 211.3 requires that separate interests in real property shall be assessed to the known owner and the failure to do so would be improper.[122] Based upon the Appellants' position that such interest is subject to the GPTA, it would require that severed oil and gas estates be separately assessed under MCL 211.3.

The Michigan Tax Tribunal has held that separate subterranean rock formations used for gas storage are entitled to be separately assessed under MCL 211.3.[123] The Michigan Tax Tribunal held in *Township of China:*[124]

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[119] *Curry v. Lake Superior Iron Co.,* 190 Mich at 449
[120] See MCL 211.3, MCL 211.6
[121] See MCL 211.53, MCL 211.58, MCL 211.59
[122] *City of Detroit v. Michigan State Tax Commission*, 369 Mich 508; 120 NW2d 258 (1963)
[123] *Township of China v. Michigan Consolidated Gas Company;* Mich. Tax Tribunal, Docket #45551 (1982) See Appendix 54b-70b (Also see *Michigan Consolidated Gas Company v. China Township,* 114 Mich App 399; 319 NW2d 565 (1982)
[124] *Township of China,Id*

> If underground rock formations are subject to taxation as real property, and if such formations are owned by entities different from those owning the surface rights (or fee), then MCLA 211.3 requires separate assessment of the two interests, because under that provision property is to be assessed to "the owner if known".
>
> In further support, we note that it is common practice for "surface" land to be split, and separately described and assessed after the split. There is no reason why splits cannot be from side to side (of the wedge from the surface to the center of the earth), instead of from top to bottom, as is the more common practice.[125]

Perhaps, it was the problem raised in *Township of China* that lead to the 1982 amendments to MCL 211.8(g).

Similarly, this Court held in *Barnes v. City of Detroit:*[126]

> 'It cannot be said that a tenant in common owns the whole property.' It [Court of Appeals] cites as authority *People ex rel. Holbrook v. Treasurer of Detroit*, 8 Mich. 14, 16, which holds: 'An undivided interest is just as much a separate estate as a divided one, and the law so regards it.' This Court held in *City of Detroit v. State Tax Commission*, 369 Mich 508, 120 NW2d 258 in a unanimous opinion, that the Board of Assessors may not refuse, when requested, separate assessments to individual owners without legal justification. (*Barnes Id* at 178)

MCL 211.3 requires separate estates to be individually assessed, and a local assessor cannot refuse to separately assess out of fear that by doing so would prevent the foreclosure upon the entity parcel. The failure of an assessor to assess the separate estates precludes the severed oil and gas mineral owner from determining their share of the total assessment, and such action is improper.[127] Since 1929, such interests have never been separately assessed.

Further, MCL 211.6 permits separate assessments of a co-tenants' interest in a single parcel. Applying the principles of law unique to oil and gas, it is clear that the surface owner and severed oil and gas mineral owners are co-tenants at the very least in the subterranean strata that

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[125] Appendix 54b-70b *Township of China, Id* Mich Tax Tribunal at page 63b-64b
[126] *Barnes v. City of Detroit*, 379 Mich 169, 177; 150 NW2d 740 (1967)
[127] *City of Detroit v. Michigan State Tax Commission*, 369 Mich at 513

contain the undeveloped oil and gas.[128]

MCL 211.53 allows a person with a separate interest in a parcel to pay such part of the total tax as it relates to his or her separate interest.[129] Under MCL 211.53(2), a person owning any "other part" of "real property assessed in one description," may pay that part of tax upon his interest by paying the tax due, as provided for in MCL 211.53(1). Upon application to pay a part, the assessor shall provide the taxpayer with a statement setting forth the proportional value of that taxpayer's part.[130] MCL 211.58 specifically provides that a person with a separate estate can pay to the county treasurer that part of any delinquent tax as provided for under section 53.[131,132]

Assuming a*rguendo,* the Appellants are correct that the value of the separate oil and gas estate not having been separately assessed can be foreclosed, the owner of the underlying oil and gas estate cannot avail themselves of these sections, as the assessor did not factor the value of oil and gas in determining "true cash value," nor as pointed out above, did the assessor have a way to determine what percent of the total tax is to be assigned to severed oil and gas mineral interests.

Appellants refer this Court to MCL 211.27(1) in support of their position that severed oil and gas is part of the true cash value of property being taxed. The term "true cash value" is

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[128] *Department of Transportation v. Goike , supra; Cf Township of China, v. Michigan Consolidated Gas Company; supra* Appendix 54b-70b
[129] MCL 211.53(2)
[130] MCL 211.53(2)
[131] MCL 211.53
[132] MCL 211.58 in part, "After the return of lands for unpaid taxes, the county treasurer is authorized to receive, under like provisions as in section 53, the amounts of the several taxes or any of them due"

defined in MCL 211.27 in part states:

> In determining the value, the assessor shall also consider the advantages and disadvantages of location, quality of soil; ... and value of standing timber; waterpower and privileges; and *mines, mineral, quarries, or other valuable deposits known to be available in the land and their value.*

However, a complete reading of MCL 211.27 and the GPTA will show a statutory scheme in how to determine the cash value of various types of property. Devoid from the GPTA statutory scheme is any mention of taxation of either severed oil and gas estates or oil and gas in place.

Under the statutory construction doctrine known as ejusdem generis, where a general term follows a series of specific terms, the general term is interpreted to include only things of the same kind, class, character, or nature as those specifically enumerated.[133]

"[A]ll statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other,"[134] and that part of an act must be construed harmoniously to effectuate the Legislature's intent.[135]

Applying these rules of statutory construction, one must read the GPTA and the Michigan Severance Tax Act together, as both are taxation statutes. Appellee-Comben maintains that the term "mineral" as used within the phrase, "mines, mineral, quarries or other valuable deposits" does not apply to oil and gas, but only to solid minerals, as the GPTA makes no mention of oil and gas. As such, the severed oil and gas interests are not subject to ad valorem real property taxation.

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[133] *Neal v. Wilkes,* 470 Mich 661, 669; 685 NW2d 648 (2004); *Huggett v. Dep't of Natural Resources,* 464 Mich 711, 718-719; 629 NW2d 915 (2001); *People v. Gould*, 237 Mich 156; 211 NW 346 (1926); *Benedict v. Department of Treasury*, 236 Mich App 559; 601 NW2d 151 (1999)
[134] *State Treasurer v. Schuster,* 456 Mich 408, 417; 572 NW2d 628 (1998)
[135] *Macomb Co Prosecutor v. Murphy,* 464 Mich 149, 159; 627 NW2d 247 (2001)

Further support that the term "minerals" is referring to metallic ore is MCL 211.6b, which establishes "prima facie true cash values" for undeveloped metallic ores that have not been severed. The legislature has enacted law in relation to metallic ores at MCL 211.6b, but no similar provision exists for severed oil and gas interests. Again, this shows a legislative intent that the only practicable means of taxation of oil and gas interests is at the time of production.

While oil and gas are minerals in the general use of the term, this Court has said that the term "minerals" can have a more limited meaning determined upon how the term was intended to be used. In at least two cases in which the term "mineral ores and minerals" is found, there was a limitation to only metallic ores or metal bearing minerals.[136]

In light of the small amount of oil and gas production in 1892 when MCL 211.27 was first enacted, and applying the above principals of oil and gas law to the phrase, "other valuable deposits known to be available in the land and their value", it clearly was not intended to include underlying severed oil and gas estates, but only hard minerals. Additionally, due to the very migrating nature of oil and gas, unlike solid minerals, it cannot be known if any oil and gas is in fact "known to be available in the land."

Notwithstanding the Severance Tax Act, the Appellants point to MCL 211.6a in support of their claim that severed oil and gas estates are taxable under the GPTA. Appellee would submit that just the opposite is true. The Legislature specifically provides for separate assessments of severed metallic mineral resources,[137] but has not done so for severed oil and gas estates. MCL 211.6a and MCL 211.6b were adopted sixteen years and 31 years, respectively, after the adoption of the Severance Tax Act. It is presumed that the Legislature is familiar with

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[136] *Fisher v. Keweenaw Land Ass'n*, 371 Mich 575; 124 NW2d 784 (1963); *Deer Lake Co v. Michigan Land & Iron Co.*, 89 Mich 180; 50 NW 807 (1891)
[137] MCL 211.6a and MCL 211.6b

the rules of statutory construction and knows of existing laws on the same subject,[138] and it is also presumed that the Legislature knows the state and effect of the interpretation given to its statutes.[139] The Legislature, when enacting these amendments to the GPTA, clearly knew and understood that the Michigan Severance Tax Act already provided for taxation of severed oil and gas interests, thus there was no need to statutorily provide a similar provision within the GPTA for severed oil and gas estates.

Despite Appellants new claim to the contrary, it is inconceivable that after 77 years since the enactment of the Severance Tax Act, severed oil and gas estates should now be subject to ad valorem real property or personal property taxation under the GPTA, and even more inconceivable that the State has left untapped this huge reservoir of possible tax revenue. The simple answer is clear, the State has always (until this action) interpreted that severed oil and gas estates were taxable under the Severance Tax Act and not under the GPTA.

The Appellants reliance upon *Curry* and *In re Petition of Auditor General,*[140] is misplaced, as these cases dealt with interests other than oil and gas reserves,[141] and did not address the applicable sections of the GPTA that provide for separate assessments or payment of taxes on separate estates.

Appellant's reliance upon *Curry* for the principal "that between the owner and person in possession must secure relief from the burden of taxation through mutual agreement between himself and the owner of such products or deposit; the assessor cannot consider such claims" is likewise misplaced and inapplicable. Severed oil and gas owners cannot protect their interest by

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[138] *Inter Cooperative Council v. Dep't of Treasury,* 257 Mich App 219, 227; 668 NW2d 181 (2003)
[139] *Gordon Sel-Way, Inc. v. Spence Bros., Inc.,* 438 Mich 488, 505; 475 NW2d 704 (1991)
[140] *In re Petition of Auditor General,* 260 Mich 578; 245 NW 522 (1932)
[141] *Curry* dealt with metallic ores, *Petition of Auditor General* dealt with flowage rights and timbers

paying the delinquent tax and then seeking contributions from the other estate holders, as their individual separate estates have not been assessed as part of the "true cash value."[142]

It is of interest to note that the GPTA makes special provisions at MCL 211.131a(3)(4), for lessees of mining[143] company property to obtain title to tax foreclosed property but there is no similar provision for lessees of oil and gas interests. This further supports the Appellant's position that severed oil and gas estates are not subject to the GPTA, but only the Michigan Severance Tax Act, and thus, cannot be foreclosed under the GPTA.

Curry relied upon the holding in *Fletcher v. Township of Alcona.*[144] In *Fletcher,* the owners of the standing timber and the owners of the real property fee were co-partners, and this matter was decided before the adoption of the GPTA, in particular MCL 211.3.

The Attorney General ruled in 1931 that a person owning a part of real estate assessed in one description may pay on the part thus owned, and in so doing, he should pay that proportion of the assessed tax as the area of land owned by him bears to the area of the whole parcel assessed.[145] In *Fuller v. Brown,*[146] this Court held that where a third story of a building was unlawfully included in an assessment against the owner of the first two stories, the court must ascertain relative value and decree tax accordingly. A tenant in common, whose interest had been taxed inseparably for the co-tenant, is only required to pay the tax on his share.[147]

The State offers no justification for why the oil and gas separate estates, having different owners, are not individually assessed as required by law, other than to rely solely on the general

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[142] *Bice v. Holmes,* 309 Mich 110; 14 NW 2d 800 (1944)
[143] MCL 211.131a(3)(4)
[144] *Fletcher v. Township of Alcona*, 72 Mich 18; 40 NW 36 (1888)
[145] Op.Atty.Gen.1931-32, p. 104
[146] *Fuller v. Brown*, 243 Mich 192; 219 NW 670 (1928)
[147] *Connecticut Mut. Life Ins. Co. v. Bulte,* 45 Mich 11; 37 NW 707 (1881)

rule outlined in *Curry,* that the entire property is assessed and the owners of all estates are liable for the taxes due, thus avoiding the severance tax. The general rule of *Curry* is inapplicable, especially when the unique characteristics of oil and gas and principles of law applicable thereto are involved.

The position the Appellants would have this Court adopt would require severed oil and gas mineral owners to pay the ad valorem tax assessed to the surface fee on the bare assertion that to do so otherwise would interfere with the enforcement of the tax foreclosure, and possibly interfere with the State's interest in oil and gas rights obtained vis-à-vis prior tax foreclosures under the prior statutory scheme.

The foreclosing of severed oil and gas estates is contrary to the stated purpose of Act 123. The purpose for adopting Act 123 is set forth in MCL 211.78(1):

> The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions.

Foreclosing upon the separate severed oil and gas estate would not encourage the efficient and expeditious return to productive use of the surface property and would have a contrary affect upon oil and gas development in this State. The Appellant even acknowledges this concern as to the State's interest in the production (profits) from oil and gas interests it now claims. The Dormant Minerals Act has the same purpose. As Act 123 was to strengthen the economic development of the surface, the clear purpose of the Dormant Minerals Act[148] was to

[148] MCL 544.291, *et seq*

encourage and strengthen the development of valuable oil and gas reserves.[149]

The purpose of the Dormant Minerals Act is "not to vest title to the severed interests in the surface owner, but rather is to facilitate the development of those subsurface properties by reducing the problems presented by fragmented and unknown ownership"[150] In *Van Slooten,* the Court of Appeals recognized the formidable task facing the surface owner in locating unknown heirs to valuable oil and gas, and held that the act "was required to prevent unknown and widely scattered heirs from preventing development of subsurface resources by inaction."[151] The trial court recognized the same problem arising in foreclosure under Act 123 when it held:

> As the Plaintiff correctly points out, it would be "an enormous Herculean, if not impossible task" to search the records of the Register of Deeds for all parcels within a 40 or 80 acre prosecution unit in order to determine the identity of all of the persons who might have a fractional interest in the underlying oil and gas."[152]

The Appellant understates the problem of providing notice to the owners of severed oil and gas interest by stating it "may not be simple."[153] The difficulty in identifying severed oil and gas owners was made clear in Appellee-Comben's petition for substituted service of the Ward Heirs, which was granted by the court.[154] Appellee- Comben's Petition set forth the enormous problem in locating severed oil and gas mineral owners, who may have an extremely small fractional interest in the severed minerals. The passage of time, deaths, name changes by divorce or marriage, the scattering of owners across the country and around the world, makes notification of foreclosure next to impossible.

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[149] *Van Slooten v. Larsen,* 86 Mich App 437, 445; 272 NW2d 675 (1978); affirmed 299 NW2d 704; 410 Mich 21; appeal dismissed 102 SCt 1242; 455 US 901; 71 LEd2d 440; *Energetics, Ltd. v. Whitmill,* 442 Mich 38; 497 NW2d 497 (1993)
[150] *Van Slooten v. Larsen,* 410 Mich 21, 44; 299 NW2d 704 (1980)
[151] *Van Slooten v. Larsen,* 86 Mich App at 445
[152] Appellants' Appendix 29a-30a
[153] Appellants' Brief at 47
[154] Ex-parte Motion for Substituted Service 23b-26b and Order for Substituted Service 27b-28

The very concerns of fractionalization and scattering severed mineral owners, which the Dormant Minerals Act[155] attempts to eliminate; the Appellant would have this Court grafted back into any foreclosure under Act 123. Appellants then would see this "streamlined process"[156] envisioned with the enactment of Act 123 come to a stop if all FGUs were required to identify and provide notice to all severed oil and gas mineral estates in order to foreclose upon the surface.

The trial court and Court of Appeals correctly acknowledged the connection between the GPTA, Act 123, the Severance Tax Act[157] and the Dormant Minerals Act[158] in coming to the conclusion that severed oil and gas interests are not subject to foreclosure under Act 123.

III. The Michigan Severance Tax Act exempts severed oil and gas estates from taxation and therefore, they are not subject to forfeiture and foreclosure under 1999 PA 123

A. Standard of Review

Issue decided below by summary disposition and issues involving statutory construction are reviewed de novo.[159] Declaratory rulings are also reviewed de novo.[160]

B. Analysis

Severed oil and gas rights are not subject to foreclosure because they are exempt from taxation by virtue of the **Severance** Tax Act.[161]

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[155] MCL 554.291, *et seq*
[156] Appellants' Brief at page 10
[157] MCL 205.301, *et seq*
[158] MCL 554.291, *et seq*
[159] *Bingham Twp v. RLTD R Co*, 463 Mich 634; 624 NW2d 725 (2001); *Kellogg Co. v. Dep't of Treasury*, 204 Mich App 489, 516 NW2d 108 (1994)
[160] *AFSCME v. Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003)
[161] MCL 205.301, *et seq*

MCL 205.315 reads as follows:

> The severance tax herein provided **for shall be in lieu of all other taxes, state or local**, *upon the oil or gas, the property rights attached thereto or inherent therein*, or *the values created thereby*; *upon all leases or the rights to develop and operate any lands of this state for oil or gas, the values created thereby and the property rights attached to or inherent therein*: Provided, however, Nothing herein contained shall in anywise exempt the machinery, appliances, pipe lines, tanks and other equipment used in the development or operation of said leases, or used to transmit or transport the said oil or gas: And provided further, That nothing herein contained shall in anywise relieve any corporation or association from the payment of any franchise or privilege taxes required by the provisions of the state corporation laws. (Emphasis Added)

The Appellants position in this matter as to the "in lieu of all other taxes" language is not only at odds with the present stated position of the Department of Treasury,[162] but also at odds with its prior position before courts of this State and with its stated position before the trial court.[163] Each time a taxpayer has raised the "in lieu of all other taxes" language as a prohibition to taxation, the Appellants have argued that the title language of the Severance Tax Act applies to only certain other taxes, and the taxation scheme at hand was not such "certain other" taxes. The Appellate Courts, and later the Michigan Tax Tribunal, have repeatedly and soundly rejected the Appellants' argument.[164]

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[162] RAB 89-22

[163] See Appendix 71b, RAB1989-22 (Appendix 5); *Cowen v. Department of Treasury,* Michigan Tax Tribunal, Docket #125440, page 5, fn 8 (1991), Appendix 40b-49b; Reversed by *Cowen v. Department of Treasury*, 204 Mich App 428; 516 NW2d 511 (1994); appeal denied, 447 Mich 980; 525 NW2d 450 (1994)

[164] *Elenbaas v. Department of Treasury*, (*Elenbaas I*), 231 Mich App 801; 585 NW2d 305 (1998); opinion superseded on other grounds by *Elenbaas v. Department of Treasury* (*Elenbaas II*), 235 Mich App 372; 597 NW2d 271 (1999); appeal denied, 463 Mich 932; 622 NW2d 63 (2000); *Cook v. Dep't of Treasury*, 229 Mich App 653; 583 NW2d 696 (1998); appeal denied, 463 Mich 932; 622 NW2d 63 (2000); *Cowen v. Dep't of Treasury*, 204 Mich App 428, 431; 516 NW2d 511 (1994); *Bauer v. Dep't of Treasury*, 203 Mich App 97; 512 NW2d 42 (1993); appeal denied 447 Mich 979; 525 NW2d 450 (1994) *Ward Lake Drilling, Inc. v. Michigan Department Of Treasury*, Michigan Tax Tribunal Docket No. 231337 (1997) Appendix 50b-53b;

The Court in *Elenbaas I,* following the holding of *Bauer,* held:

> We reaffirm that the *Bauer* Court correctly interpreted the language of § 15. If the plain and ordinary meaning of statutory language is clear, judicial construction is normally neither necessary nor permitted. The phrase "[t] he severance tax herein provided for shall be in lieu of all other taxes, state or local" is clear and unambiguous. *The word "all" usually denotes an unqualified classification, leaving no room for exceptions.* (Cites omitted)(Emphasis Added)[165]

Bauer[166] and its progenies have continually held that MCL 205.315 is clear and unambiguous, and the severance tax is in lieu of *all other taxes*. The Appellants have argued in the past that *Bauer* was wrongly decided, only to have this claim soundly rejected.[167]

In *Cook v. Dep't of Treasury* the Court held:

> In addition, since *Bauer* was decided, the Legislature has had two opportunities to correct Bauer's understanding of the severance tax act if it was contrary to legislative intent. In 1994, the severance tax act was amended to add a provision to help finance the orphan well fund and the state general fund. In 1996, the act was again amended to add a severance tax exemption for certain gas and oil products. The Legislature is presumed to act with knowledge of appellate court statutory interpretations. We agree with plaintiffs that *Bauer* must be accepted as established law at least in our Court for purposes of these appeals.[168] (Cites omitted)

MCL 205.315 exempts three specific areas from ad valorem real property taxation:

1. Oil or gas, the property rights attached thereto or inherent therein
2. Upon all lease ***or***
3. The right to develop and operate any lands of this state for oil and gas

If MCL 211.1 and MCL 211.27 require the value of the severed oil and gas estate to be included in the "true cash value", then the language "oil and gas, the property rights attached thereto or inherent therein" and "right to develop and operate any lands of this state for oil and

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[165] *Elenbaas v. Department of Treasury* (*Elenbaas I*), 231 Mich App 801; 585 NW2d at 307; opinion superseded on other grounds [as to the calculating net operating loss] by *Elenbaas v. Department of Treasury* (*Elenbaas II*), 235 Mich App 372; 597 NW2d 271 (1999)
[166] *Bauer v. Dep't of Treasury*, 203 Mich App 97
[167] See *Cook v. Dep't of Treasury* id; *Ward Lake Drilling v. Department of Treasury,* Docket NO. 203869, Mich App, Jan 29, 1999 Appendix 83b-85b
[168] *Cook v. Dep't of Treasury*, 229 Mich App at 656

gas" would be rendered meaningless. Statutes relating to the same subject, or having the same general purpose should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other.[169]

The same would hold true to "the right to develop and operate upon any lands of this state." While the forfeiture and foreclosure under Act 123 will affect the surface owners' right to use the property, it cannot affect the severed oil and gas owner's use of the land to develop and operate on the surface, or their interest in the oil and gas. To hold otherwise would be in total disregard of the principles of law that govern oil and gas in this state and the "in lieu of" language. While exemptions are strictly construed in favor of the government,[170] exemptions must be interpreted according to ordinary rules of statutory construction.[171]

Elenbaas I[172] supports Appellee-Comben's position that the "in lieu of all other taxes" language in MCL 205.315 prevents the value of oil and gas in place from real property ad valorem taxation and from foreclosure when the Court held:

> "***According to the language of the second phrase, leaseholds are not subject to any other taxes***, which necessarily includes property tax that would otherwise normally be paid. ***Construing § 15 as only exempting ad valorem property taxes, as the Tax Tribunal argued in Cowen, however, would amount to ignoring the first phrase. The oil and gas itself, property rights attached to the oil and gas, and the values created by the oil and gas are also not subject to any other taxes according to that phrase. It is not just the leaseholds, which are subject to property taxes that are exempt from all other taxes.*** Receipts and royalty interests are "property rights" that are attached to the oil and gas itself. In *Mobil Oil Corp. v. Dep't of Treasury*, 422 Mich. 473, 479-480, 373 N.W.2d 730 (1985), the Supreme Court discussed the nature of oil and gas transactions. The operator-lessee is entitled to enter onto the surface of the property to explore for oil and gas. *Id.* The landowner-lessor is paid a sum of money by the operator-lessee for the right to explore the land. The property owner is also entitled to a royalty, either in kind or in money, on all of the oil or gas that is

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[169] *State Treasurer v. Schuster,* 456 Mich 408, 417; 572 NW2d 628 (1998)
[170] *Beckman Production Services, Inc. v. Dep't of Treasury,* 202 Mich App 342, 345; 508 NW2d 178 (1993)
[171] *ADVO-Systems, Inc. v. Dep't of Treasury,* 186 Mich App 419, 423; 465 NW2d 349 (1990)
[172] *Elenbaas v. Department of Treasury* (*Elenbaas I*), 231 Mich App 801; 585 NW2d at 307

> extracted. Id. Thus, the property owner has a property interest, by way of the royalty interest, in all of the oil or gas that is extracted from his property. ***The royalties are therefore exempt from further taxation because they are "property rights" attached to the oil or gas.*** Moreover, royalties are arguably, "values created" by the severance of the oil and gas because without the severance of the oil and gas, plaintiffs would not be entitled to the royalties. ***Because we find that receipts and royalty interests are included within § 15, they are exempt from taxation other than the taxes paid under the severance tax act.*** [173] (Emphasis Added)

This holding is consistent with the trial court and Court of Appeals' ruling. The fact that Appellants claim title to oil and gas interests over the last 60 or so years as a result of foreclosure for delinquent taxes is of little importance. The State's right to such oil and gas interest is dependent upon the fact that such foreclosed interest was subject to real property taxation, and the proceeding foreclosing them was proper to invest title. If either the foreclosure proceeding was improper or the State's notice under MCL 211.131e was improper, it is not a matter before this Court.

Art. 9, § 3 of the Michigan Constitution supports the same conclusion. Art. 9, § 3 provides:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible property *not exempt by law*. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. *The legislature may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation.* Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates. (Emphasis Added)[174]

A review of The Michigan Constitutional Convention Record clearly shows that the drafters had in mind that the severance tax was an alternative means of taxation of property, and

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[173] *Elenbaas v. Department of Treasury* (*Elenbaas I*), 231 Mich App 801; 585 NW2d at 307
[174] Mich Const. Art. 9, § 3

that this was in lieu of the general ad valorem general property tax. The Constitutional Convention Record clearly states this intent:

> The provision with respect to equalization is less detailed than that found in Sec. 8, of present Article X, but clearly imposes the requirement that assessments be equalized as between various assessing units.
> *The provision for alternative means of taxation of property, in lieu of general ad valorem taxation, is also necessary if such taxes* as the automobile weight tax, the tax on boats, *the severance tax on oil and gas,* and state assessment and taxation of certain utilities' properties *are to be maintained. This provision gives the legislature reasonable freedom to remove certain kinds of property from general property taxation and to provide alternative tax treatment of such property.* [175]
> (Emphasis Added)

Since 1963, the legislature has taken no action to the contrary. The severance tax does not eliminate taxation on oil and gas, but is simply an alternative form of taxation, and is in lieu of the general ad valorem taxation as permitted by Art 9, § 3. It is Appellee-Comben's position that oil and gas in place, the property rights attached thereto, the leasehold interest, estates which have been severed from the surface fee, and oil and gas once produced is subject to taxation, not under the GPTA, but taxation is deferred until severed from the ground and taxed under the Severance Tax Act. If it is to be otherwise, let the Legislature clearly speak to it.

Attempts to determine the value of oil and gas in place had been tried earlier and repealed. The advantage of taxing oil or gas at the time it is produced was apparent to the Legislature, as pointed out by Boice Gross, in a 1930 State Bar Journal article,[176] when addressing the newly enacted Severance Tax Act. The author noted:

> The advantages of this sort of tax are apparent. It does away with the confusion and inequality, which would inevitably arise if the oil and gas were to be valued by local assessors.[177] *178*

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[175] The 1963 Constitutional Convention Record, at page 854
[176] See Gross, Michigan's Legislation Governing Oil and Natural Gas, 10 Mich SBJ 193, 195 (1930), Appendix 38b-39b
[177] See Gross, Michigan's Legislation Governing Oil and Natural Gas, 10 Mich SBJ 193, 195 (1930), Appendix 39b

The Legislature has determined that it was best to tax oil and gas when produced, as opposed to by ad valorem taxation when it was in place.

Appellant-Department of Treasury has continued to this date to acknowledge that the "in lieu of" language extends to "ad valorem property taxes."[179] While Appellant-Department of Treasury has modified parts of RAB 22 and other RABs dealing with the severance tax, it has not in the past 17 years, since RAB 1989-22 was first published, and over two years since the lower court's ruling, amended or withdrawn the holding that "this provision [Section 15] extends only to the ad valorem property taxes that were in effect at the time the above-referenced section was enacted (1929)."[180] The only ad valorem property tax in place in 1929 was real and personal property tax.

Appellant-Treasury, under its statutory authority[181] to issue revenue administrative bulletins, stated in RAB 1989-34, "A Revenue Administrative Bulletin states the official position of the Department, has the status of precedent in the disposition of cases unless and until revoked or modified."[182]This Court has held, "the construction placed upon a statute by the agency legislatively chosen to administer it is entitled to great weight."[183]

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[178] Cited with approval by the Michigan Tax Tribunal in *Cowen v. Department of Treasury,* Appendix 40b-49b Michigan Tax Tribunal, Docket #125440, fn 8 (1991) fn 8 at Appendix 49b; Reversed by *Cowen v. Department of Treasury,* 516 NW2d 511; 204 Mich App 428 (1994); appeal denied, 447 Mich 980; 525 NW2d 450 (1994)

[179] Appendix 71b, RAB1989-22

[180] See Appendix 72b-75b, RAB 2001-5 [Which replaced RAB 1996-1 and partially rescinding RAB 1989-22, but only to the extent it refers to income tax]; Appendix 76b-77b, RAB 1996-1, [as income tax relationship to severance tax]; Appendix 78b-79, in part, RAB 2000-6 [withdrawing other prior bulletin dealing with Severance Tax Act but not RAB 1989-22]

[181] MCL 205.3(f)

[182] Appendix 80b-82b RAB 1989-34

[183] *In re D'Amico Estate*, 435 Mich 551, 559; 460 NW2d 198 (1990)

The Michigan Supreme Court in *D'Amico* held:

> One of the soundest reasons sustaining contemporaneous interpretations of long standing is the fact that *the public has relied on the interpretation.* While the principle is not strictly that of estoppel running against the government there is some analogy to that principle when the interpretation has been made by a government agency or officer." (Emphasis original)[184]

For the past 17 years, Appellant-Treasury has interpreted, acknowledged and enforced the "in lieu of" language to mean "ad valorem property taxes." Despite this fact, they would now have this Court overrule their own stated position and hold the "in lieu of all other taxes" language to mean all other taxes, but not ad valorem property taxes. What "other taxes" are left?

If the Appellants' position is correct, it would have the absurd result of the subsurface owners' interest being foreclosed, notwithstanding the fact that there had been payment in full of all tax obligations under the Severance Tax Act on the very interest now sought to be foreclosed. If the State's logic were correct, the subsurface oil and gas estate would be subject to both ad valorem taxation as to oil or gas in place under the GPTA and severance tax. If the "in lieu of" language of MCL 205.315 is to have any meaning, clearly it is to mean that a severed oil and gas estate is not subject to ad valorem taxation under the GPTA and cannot be foreclosed upon with that of the surface owner's interest. If the Appellants' position is correct, the severed oil and gas estate owners would be required to twice pay taxes on the same interest. Clearly, MCL 205.315 would not require such a payment, as the severance tax is in lieu of all other taxes.

Faced with the explicit language of MCL 205.315, which specifically mentions leases, and which Appellant fully admitted to the trial court could not be foreclosed, now only begrudgingly acknowledges that leasehold interests *might be exempt* from ad valorem

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[184] *In re D'Amico Estate*, 435 Mich at 560

taxation, but claims that the lessor's estate would be foreclosed under the doctrine of superior title.[185]

Appellee-Comben maintains that the "in lieu of all other taxes" language carves out an exception to the general position set forth in *Curry* that all estates are subject to being assessed and levied against the lands described on the tax roll. In other words, MCL 205.315 exempts the value of oil and gas estate interests from being taken into consideration in determining the "true cash value" under Section 27 of the GPTA, and therefore, prevents foreclosure.

Taxation of an oil and gas estate is thus limited to taxes payable under the Michigan Severance Tax Act and therefore, it is not subject to ad valorem taxation, nor is it subject to foreclosure, as no tax is due on this interest.

IV. The provisions of 1999 PA 123 are constitutionally invalid as a denial of due process, unless notice by publication is allowed as to the severed oil and gas owners and the parties to a Unitization Agreement.

A. Standard of Review

Issue decided below by summary disposition and issues involving statutory construction are reviewed de novo.[186] Declaratory rulings are also reviewed de novo.[187]

B. Analysis

Appellee-Comben agrees with Appellants to at least some extent that the notice requirements of the Act meet the constitutional requirements of *Dow v. Michigan*[188] and *Smith v. Cliffs on the Bay Condominium Ass'n.* [189]

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[185] Appellants' Brief at page 49
[186] *Bingham Twp v. RLTD R Co*, 463 Mich 634; 624 NW2d 725 (2001); *Kellogg Co. v. Dep't of Treasury*, 204 Mich App 439; 516 NW2d 108 (1994)
[187] *AFSCME v. Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003)
[188] *Dow v. Michigan*, 396 Mich 192: 240 NW2d 480 (1976)
[189] *Smith v. Cliffs on the Bay Condominium Ass'n,* 463 Mich 420; 617 NW2d 536 (2000)

But when applied to the public records required to be searched under MCL 211.78i(6) to identify persons with a property interest, it is unconstitutional, as such records will not identify all persons who might have a property interest in the property being foreclosed.

Appellants claim that the Unitization Agreement does not convey an interest in the oil and gas in place. However, the Unitization Agreement does convey a constitutionally protected contract or property interest, which is to share in a "profit" from the oil and gas once produced. The parties to such agreements have a contractual right to share in the "profits" whether or not an oil and gas well is upon their property. A contract right is a property right, and the State may not impair or destroy vested property rights or contractual rights and obligations without due process.[190]

The due process requirements of notice are rather simple to comply with when dealing with a single parcel of land. A title search and personal inspection should reveal persons with a property interest in that parcel. However, the property rights created by the unitization agreement are not limited to a single parcel or a single person, but to all owners with an interest in the underlying oil and gas, which spread over 7,000 acres. It would be a Herculean, if not impossible task, to not only search the records of the Register of Deeds (in the Case of Antrim County, you would also have to search the records of Otsego County), but to visit all parcels within the 7,000 plus acres in an attempt to locate all persons with an interest.

The Legislature recognized the due process requirements of the United States and Michigan Constitutions,[191] however, clearly did not foresee a single parcel foreclosure as

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[190] *Miller v. Magline, Inc.*, 105 Mich App 413, 419; 306 NW2d 533 (1981); Mich Const. Art. 1, § 10

[191] See MCL 211.78(2)

affecting persons having a property interest in such a parcel covering more than 7,000 acres in area.

The notice provisions of Act 123 are not limited to only a fee simple interest but to persons with a property interest in the parcel being foreclosed, which includes contractual rights to the profit in the underlying oil and gas.[192]

Both Appellant and Appellee-Comben agree that owners of a severed mineral interest have a property right that at the very least entitles them to notice of the administrative show cause and judicial foreclosure hearing, and that without such due process notice, their interest cannot be extinguished.[193] In this case, it would include all parties to the Unitization Agreement covering more than 7,000 acres.

The controlling case dealing with due process is *Mullane v. Central Hanover Bank & Trust Co.*[194] The touchstone of *Mullane* is simple: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[195] Notice by publication is not constitutionally adequate '(w)ith respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resorting to means less likely than the mail to apprise them of its pendency, notice by mail is adequate. Mailed notice must be directed to an address reasonably calculated to reach the person entitled to notice.

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[192] *e.g.* See MCL 211.78a(4)(5), MCL 211.78b, MCL 211.78c, MCL 211.78f(1)
[193] *Van Slooten v. Larsen*, 410 Mich 21
[194] *Mullane v. Central Hanover Bank & Trust Co*, 339 US 306; 70 SCt 652; 94 Led2d 865 (1950)
[195] *Mullane v. Central Hanover Bank & Trust Co,* 339 US 306

The problem is that the names and post office addresses of severed mineral owners, due to the passage time, cannot be reasonably located. Parties to the Unitization Agreement are not "easily ascertainable," thus personal service is not required.[196]

Appellee-Comben does not maintain that giving notice by mail creates the difficulty. The difficulty arises from the fact that even after exerting a reasonable effort from review of the public records required by Act 123, Appellee-Comben cannot identify all persons who might have a property interest in a particular parcel being foreclosed.

The courts have recognized that it is practically impossible to give personal notice in some cases.[197] The general rule that emerges from *Mullane* is that notice by publication is not enough *with respect to a person whose name and address are known or very easily ascertainable.*

The Michigan Supreme Court in addressing substitute service under then existing Michigan Court Rules held in *Krueger v. Williams:*[198]

> *It is important to note that Mullane acknowledged the possibility that the means chosen would never reach the defendant. "(I)t has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights."* * * * We are reminded of the frequently quoted words of Justice Holmes, "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances, no doubt justice will be done."
>
> The Supreme Court in *Mullane* held:
>
> *This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a*

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[196] *Dow v. Michigan*
[197] See *Mullane,* supra
[198] *Krueger v. Williams*, 410 Mich 144, 158-159; 300 NW2d 910 (1981)

probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.[199] (Emphasis Added)

Appellee-Comben is faced with such unique circumstances that notice by publication will meet the constitutional requirements of due process as to those parties not easily identifiable arising from the Unitization Agreement. If Appellee-Comben is not entitled under the circumstances present to provide notice by publication to parties to the Unitization Agreement, then the provisions of 1999 PA 123 would be unconstitutional as applied in this matter.

V. Lessee of mineral rights who has leased the right from the surface estate owner is not entitled to notice in foreclosure proceeding under the GPTA, as the lessee's leasehold interest is unaffected by the foreclosure proceeding involving the surface estate.

A. Standard of Review

Whether a lessee is entitled to notice in the tax foreclosure proceeding is a question of law that is reviewed de novo.[200]

B. Analysis

Appellee-Comben assumed that question 2 of this Court's October 27, 2005 order was directed to severed oil and gas mineral interests. For reasons stated herein, a lessee's leasehold interest in severed minerals, other than oil and gas, i.e. metallic minerals, if not separately assessed and taxed, would be subject to extinguishment under MCL 211.78k(5)(e). As stated above, the rationale is based upon the fact that metallic minerals are specifically addressed in the GPTA.

However, it is Appellee-Comben's position, as was the Appellants at the trial court level, that a lessee's leasehold interest in oil and gas, flowing from the surface owner is not subject to

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[199] *Mullane, supra* at 315

[200] *Devillers v. Auto Club Ins. Ass'n,* 473 Mich 562; 702 NW2d 539 (2005)

being extinguished under MCL 211.78k(5)(e). This rationale depends largely upon this Court's answer as to whether "in lieu of all other taxes" at MCL 205.315 exempts the oil and gas leasehold from taxation under the GPTA. If the leasehold interest is not exempt from ad valorem real property or personal property taxation imposed under the GPTA, then such oil and gas leasehold would be extinguished by MCL 211.78k(5)(e), and the lessee would have to receive notice of the foreclosure proceedings which would be in direct conflict with the clear language of MCL 205.315, which states that oil and gas leases are exempt from all other taxation.

Appellee-Comben is mystified by the Appellants' new position that leasehold interests are not a "significant property interest" entitled to notice of the foreclosure proceeding. Michigan law recognizes that a leasehold interest is an interest in real property, and it is not personal property.[201] Act 123 supports this position in that MCL 211.78i(3) requires the FGU to visit the property being foreclosed to determine if it is occupied. And, if occupied, notice of a foreclosure proceeding is required to be served upon the occupant, and further, it is required that the occupant be advised that if delinquent taxes are not paid, the occupants will be required to vacate the premises. Clearly, the purpose of this is to allow a person with an interest in the property to either take steps to see that the taxes are paid and protect their interest, or be prepared to vacate.

Appellants argue that even oil and gas leases are exempt from taxation and thus not subject to foreclosure under Act 123, however, claim that such leasehold is subject to "cancellation" under the doctrine of superior title citing *Tilchen v. Boucher*[202] and *Dolese v.*

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[201] *Eadus v. Hunter,* 268 Mich at 244; *Wentworth v. Process Installations, Inc.*, 122 Mich App 452, 464; 333 NW2d 78 (1983)

[202] *Tilchen v. Boucher,* 328 Mich 335; 43 NW 2d 885 (1950)

Bellows-Cluade Neon Co.[203] In *Tilchen,* a land contract vendee leased the property and thereafter defaulted, and the land contract vendor obtained possession by summary proceeding. In *Dolese* a lease was executed after a foreclosure sale, and the court ruled that the lease ended upon expiration of the redemption period. In each case, clearly the leasehold interest being second in time was inferior to that land vendor interest and that of a purchaser of a tax sale who steps into the shoes of the mortgagee.

The law of mortgage foreclosure has limited, if any, application to the law of tax foreclosure. Under the doctrine of superior title as used in mortgage law, a mortgage that postdates a lease, when foreclosed, would not terminate the leasehold interest. Under the law of tax foreclosure and MCL 211.78k(5)(e), an interest in real property which pre-dates the date the tax lien becomes effective can, notwithstanding "superior title in time," be foreclosed for non-payment of taxes. Superior title under tax foreclosure is not based on the same principals as superior title in real property/mortgage law. Superior title under tax foreclosure is statutorily created. If superior title under tax foreclosure followed the doctrine of superior title in real property law, it would be nearly impossible to foreclose property for non-payment of taxes unless the property owner owned the property free and clear. If this were true, a property owner could avoid the adverse affect of non-payment of real property taxes by simply mortgaging the property. The end result would be that the voluntary payment of real property taxes would end, and the taxing agency could not enforce a tax lien, as it, the tax lien, would in most, if not all cases, be inferior to the existing mortgage or some other "superior" in time interest.

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[203] *Dolese v. Bellows-Cluade Neon Co.*, 261 Mich 57; 245 NW 569 (1932)

If MCL 205.315 is going to have any purpose, the oil and gas leasehold interest must not be subject to the broad language of MCL 211.78k(5)(e). MCL 211.78k (5)(e) must be read in conjunction with MCL 205.315.

If oil and gas leasehold interests are deemed to be subject to MCL 211.78k(5)(e), oil and gas development would come to a complete end in Michigan. An oil and gas lessor receiving lease royalty payments equaling less than the lessor's real property tax obligation could simply not pay the real property tax, forcing the oil and gas lessee to pay the real property tax in order to protect his/her interest. In such a case the right to contribution as set forth in *Curry*[204] would be meaningless, as the lease royalty would not cover the cost of payment of taxes.

Upon entry of judgment under MCL 211.78k(5)(e), all existing interests in the foreclosed property are extinguished. The fact that all-existing interests in a parcel can be extinguished is the very reason that notice of the foreclosure must be given to any person with an interest in the property.

The Appellants would have this Court read MCL 211.78k(5)(e) in a vacuum, as if MCL 205.315 did not exist. In light of the more general nature of the language in MCL 211.78k(5)(e), an "interest in property" must give way to the specific language in MCL 205.315. "It is a principle too common to require citation that statutes will be construed whenever possible so as to avoid contradiction. Similarly, it is a principle of construction that where there is expressed a general intention and also a particular intention which is inconsistent with the general one, the particular intention shall be considered an exception to the general one."[205] The Severance Tax

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[204] *Curry v. Lake Superior Iron Co.,* 190 Mich 445, 449;157 NW 19 (1916)
[205] *Minor Child v. Michigan State Health Commissioner*, 16 Mich App 128, 131; 167 NW2d 880 (1964)

Act specifically deals with the exemption of taxation as to all other forms of taxation regarding an oil and gas lease interest, and accordingly the lease is not extinguished by the tax foreclosure.

V. Response to Brief of Amicus Curiae State Bar of Michigan Real Property Law Section *In Rem* Argument

A. Standard of Review

B. Analysis

Appellee-Comben would agree with the State Bar that a tax foreclosure proceeding is an *In Rem* proceeding. Further, that "a proceeding *in rem* is essentially a proceeding to determine the right in specific property against all the world, equally binding on everyone."[206] In a proceeding *in rem*, like an *in personum* proceeding, the subject matter of the action must be properly before the court. It is Appellee-Comben's position, and the rationale of the lower court and the Court of Appeals, that severed oil and gas interests are not part of specific property (*in rem*), which is subject to tax foreclosure.

The State Bar maintains that "[t]he objective of a tax foreclosure proceeding is the disposition of the property itself, without regard to the individual interest of a holder in the estate's mineral right."[207] The State Bar also states that "a tax proceeding must operate to extinguish all recorded and unrecorded interests in the estate including all oil, gas and other mineral rights, because the proceeding *is in rem*."[208]

MCL 211.3 requires that separate interests in real property shall be separately assessed.[209] Other provisions of the GPTA allow for separate assessments and taxation.[210] Under the State

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[206] *Int'l Typographical Union v. Macomb County*, 306 Mich 562, 575; 11 NW2d 242 (1943)
[207] State Bar brief, pages 9-10
[208] State Bar brief, page 10
[209] City of Detroit v. Michigan State Tax Commission, 369 Mich 508
[210] MCL 211.5, MCL 211.6, MCL 211.6a and MCL 211.6b

Bar rationale,[211] such separate estate or severed estate, permissible under the GPTA to be separately assessed and taxed, notwithstanding that they are current with payment of their taxes, must be extinguished if the surface owner's interest is foreclosed simply because it is an *in rem* proceeding, and the plain language of MCL 211.78k(5)(e) mandates it. This clearly points out that the issues before this Court are not of "academic interest."[212] If such a case were true, the severed mineral interest would not be part of the *in rem* estate subject to foreclosure and thus not entitled to notice. Similarly, oil and gas interests set forth in MCL 205.315 would not be part of the *in rem* surface estate subject to the tax foreclosure action.

RELIEF

Appellee–Comben asks this Court to uphold the Trial Court and the Court of Appeals and declare that severed oil and gas rights are not subject to taxation and foreclosure under the General Property Tax Act; that the "in lieu of all other taxes" language in the Severance Tax Act is in lieu of ad valorem real property and personal property tax imposed under the General Property Tax Act; that lessees of oil and gas leases are not required to be given notice under 1999 PA 123 of the foreclosure proceedings, as such interests are not subject to foreclosure under 1999 PA 123; or, if such interests are subject to 1999 PA 123, that the notice provisions of the Act will not provide due process notice to such interested owners, as MCL 211.78j will not identify all severed oil and gas mineral owners with an interest in the property being foreclosed.

Respectfully Submitted,

1-24-2006
Date

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[211] State Bar brief, page 10
[212] State Bar brief, page 8